IN THE HIGH COURT OF AUSTRALIA

DARWIN REGISTRY

No. D11 of 2018

BETWEEN:

THE NORTHERN TERRITORY OF AUSTRALIA

Appellant

and

SOULEYMANE SANGARE

Respondent

SUBMISSIONS OF THE AMICUS CURIAE

PART I: INTERNET PUBLICATION

1. The Amicus certifies that these submissions are in a form suitable for publication on the internet.

PART II: STATEMENT OF THE ISSUE

2. The central issue raised by this matter is whether, and to what extent, an unsuccessful litigant's circumstances, both subjective (including impecuniosity) and objective (including futility or impossibility of enforcement), may inform the exercise of the court's discretion not to award costs in favour of a successful litigant.

PART III: NOTICE UNDER S78B OF THE *JUDICIARY ACT 1903* (CTH)

3. The Amicus certifies that they consider notice is not required pursuant to s78B of the *Judiciary Act 1903* (Cth).

PART IV: STATEMENT OF FACTS

4. The Amicus accepts and adopts the Appellant's statement of facts.

PART V: SUBMISSIONS

5. There is no statutory provision granting the Supreme Court of the Northern Territory the power to award costs. The power instead arises from the court's inherent jurisdiction as a superior court of record and by necessary implication from r63.03(1) of the *Supreme Court Rules*.

6. An award of costs is an exercise of discretion, which will normally only be open to review if there has been a *House v The King*-style error.[1]

7. Historically, the High Court has said of costs that it "does not (whether it can or not) interfere with the discretion of the Court appealed from when exercised upon a correct appreciation of the legal bearing of the facts".[2]

8. In this case, the Appellant contends the NT Court of Appeal did not exercise their discretion according to established legal principles. The claimed principle is that impecuniosity of the unsuccessful party cannot justify depriving a successful party of an order for costs. The question of existence of such a principle needs careful scrutiny.

Impecuniosity

9. Impecuniosity is not, of itself, a reason to deprive a successful party of their costs but it can be, in combination with other factors, a reason to depart from the general rule that costs follow the event.[3] There is no reason for an inflexible rule that every party's financial position is always irrelevant.[4] The statement that a successful litigant can reasonably expect an award of costs is an oversimplification of the nature of a costs award, and fails to take into account the multifaceted forms of litigation and their outcomes.[5]

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[1] *House v The King* (1936) 55 CLR 499 at 504-5
[2] *Maiden v Maiden* (1909) 4 CLR 764 at 708 per Griffith CJ
[3] *Aldridge v Victims Compensation Fund Corporation (No 2)* [2008] NSWSC 1040 at [8]
[4] *Edwards v Stocks* (2009) 17 Tas R 454 at [13]
[5] See, for example, G E Dal Pont, *Law of Costs* (3rd ed), LexisNexis Butterworths, Chapter 8; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [41]

10. The decisions of other intermediate appellate courts in Australia on the significance of impecuniosity of an unsuccessful party are not expressed in absolute terms. It is not an inflexible rule.[6] Impecuniosity would not justify a departure from costs following the event if it would be manifestly unfair to do so.[7] Moreover, the Victorian authority referred to by the Appellant[8] dealt with the obvious position that the financial position of a successful party is not relevant to the question of costs. The NSW decisions must be considered in light of Rule 42.1 of the *Uniform Civil Procedure Rules* which requires costs to follow the event unless the court considers some other order should be made.

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11. In any event, the necessary application of the principle set down in *Farah Constructions*[9] to matters involving the exercise of judicial discretion is unclear.

12. To dismiss the impecuniosity of a litigant out of hand would be to place a fetter on the exercise of the costs discretion. General principles, as outlined by the Appellant, cannot harden into legal rules which would confine the discretion.[10] Instead, the court must determine, on the facts of each case before it, what is and is not relevant in that matter to the exercise of its discretion. This may, in some cases, involve the receipt of additional evidence from the parties.

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13. The practical difficulties in determining the financial position of a party often acts as a justification for not having regard to impecuniosity. There is no such impediment here. In this case, the following evidence was before the Court:
    a. The Respondent is a citizen of Guinea and not an Australian resident;[11]
    b. The Appellant admitted the Respondent's employment commenced June 2014 and was terminated by letter dated 10 December 2014;[12]

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[6] *Marlow v Walsh (No 2)* [2009] TASSC 40 at [13]
[7] *Machado & Anor v Underwood & Anor (No 2)* [2016] SASCFC 123 at [45]
[8] *Board of Examiners v XY* (2006) 25 VAR 193
[9] *Farah Constructions Pty Ltd & Ors v Say-Dee Pty Ltd* (2007) 230 CLR 89 at [135]
[10] *Norbis v Norbis* (1986) 161 CLR 531 at 537 cited with approval in *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [35]
[11] CAB 48 [17]
[12] CAB 45 [10]

c. The Appellant understood, and there was no evidence to suggest otherwise, that the Respondent's bridging visa expired on 17 December 2014 and he was unable to work in Australia after that date;[13]

d. The Respondent had asked the Court to "waive" any order for costs.[14]

14. At the time of the appeal, the Respondent had not been employed for over two and a half years. There was no prospect he would gain employment, given his visa situation. It was unclear whether he would be lawfully allowed even to remain in Australia.

10 15. Based on these factors, the Court's conclusion that Mr Sangare was "most unlikely"[15] to be able to pay any costs was a conclusion that was open to the Court, and to which the Court could refer in exercising the discretion to make no order as to costs.[16]

Futility

16. The Court below considered that it should not make a futile order.[17] This principle has a substantial background in equity, where an order can be refused "where there [is not] a sufficiently high probability that the making of the proposed order will provide a sufficient benefit to the plaintiff to render that order just in all the circumstances".[18]

20 17. Questions about the usefulness of making a costs order in circumstances where the order will not be obeyed are not new.[19]

18. While it is accepted that a costs order as a debt may be of some use to a party, it must be remembered that the purpose of a costs order is primarily to indemnify a successful party, not to punish the unsuccessful.[20] This means that, if there is a prospect that a costs order may be used to oppress or otherwise place insurmountable financial barriers

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[13] CAB 81 [89]
[14] BFM 1
[15] At [47] of the Court of Appeal's reasons, CAB 134
[16] *Scott v Secretary, Department of Social Security (No 2)* [2000] FCA 1450 at [8] per Finkelstein J (in dissent)
[17] At [48] of the Court of Appeal's reasons, CAB 134
[18] Spry, *The Principles of Equitable Remedies* (8th ed, 2010) 128
[19] *Hamod v New South Wales (No 13)* [2009] NSWSC 756 at [28]
[20] *Latoudis v Casey* (1990) 170 CLR 534 at 543

in the way of the unsuccessful party, the Court should consider those valid reasons to decline making an order for costs.[21]

19. The Court of Appeal in this matter was cognizant of this principle and expressed as much in their decision.[22]

20. The Amicus submits that, in the exercise of a court's discretion to award costs, and especially in matters involving self-represented litigants, the court should be vigilant that a larger litigant, and specifically the State, does not seek to use awards of costs as de facto tools of individual punishment and oppression. Such considerations are consistent with the court's duty to exercise their discretion judicially and with regard to the interests of justice.

21. The court is entitled to look at the practical impact the making of a costs order may have. It may have regard to an individual's circumstances. The extent to which these circumstances may be relevant in any particular case will vary. Such variation is the underpinning of the principle giving the widest possible discretion in the awarding of costs.

22. The modern trend toward lump-sum costs orders is an example of this principle.[23] In attempting to reduce the cost of litigation and to promote access to justice, the ability to consider a party's financial capacity, liquidity of assets, or history of compliance with orders, have all been recognised as factors to be weighed in determining the form of any order for costs.[24] Relative disadvantage between parties can also play a role.[25]

23. In its submissions, the Appellant raises, in effect, a procedural fairness issue.[26]The principle upon which this submission is based is that a party should not be left in the

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[21] *WAFU v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FMCA 325 at [47]; though this consideration was held to be irrelevant in *WAEY v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1314

[22] At [47], CAB 134

[23] Outlined by Murphy J, speaking extra-judicially: *The Problem of Legal Costs: Lump sum costs orders in the Federal Court* (2017) National Costs Law Conference; see also *Costs Shifting – Who pays for litigation* [1995] ALRC 75

[24] *Hadid v Lenfest Communications Inc* [2000] FCA 628; *Dunstan v Human Rights and Equal Opportunity Commission (No 3).* [2006 FCA 916 at [29]; *Salfinger v Niugini Mining (Aust) Pty Ltd (No 5)* [2008] FCA 1119

[25] *Dunstan v Seymour* [2006] FCA 917 at [25]

[26] Appellant's submissions [24]

dark as to a possible adverse finding and thus deprived of the opportunity to adduce additional material.[27]

24. The Court of Appeal asked the parties whether, having heard both parties' submissions, they were happy for the Court to pronounce their decision on costs in writing, without resuming. Counsel for the Appellant indicated he was.[28]

Orders sought by the Appellant

25. In the event the appeal is allowed, the Appellant seeks orders as to costs at first instance and before the Court of Appeal.

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26. The alternative would be for the matter to be remitted to the Court of Appeal.

27. In opposing cost orders before the Court of Appeal, the Respondent raised issues in additional to his financial circumstances.[29] Additionally, the Appellant had conceded a publication conveyed three defamatory imputations concerning the Respondent[30] but was successful in its pleaded defences.

28. The costs reasons of the Court of Appeal were brief. They did not address all grounds. That does not mean the decision was not influenced by matters not expressed.

20 Costs in this Court

29. The Appellant seeks an order that the Respondent, Mr Sangare, pay the costs of the appeal to this Court.

30. Mr Sangare has not participated in the proceedings before this Court. He is not eligible for a certificate pursuant to s14 of the the *Federal Proceedings (Costs) Act 1981* (Cth).

31. Had Mr Sangare been willing to appear, given the circumstances of the case it may have been expected that special leave would have been granted with the condition that the Appellant pay the costs of the appeal to this Court.[31]

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[27] *Mahon v Air New Zealand Ltd* [1984] AC 808 at 820-821
[28] BFM 2
[29] BFM 1
[30] CAB 46 [14]
[31] *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [42], [99] – [100]

32. In relation to the Amicus, it has generally been thought inappropriate to make an order that a party pay costs to a friend of the Court.[32] There is no power under the *Federal Proceedings (Costs) Act 1981* (Cth) to award a costs certificate to either party to the appeal to cover the Amicus costs,[33] and the Amicus has no standing under that Act to make application.[34]

PART VI: NOTICE OF CONTENTION OR CROSS APPEAL

33. Not applicable.

PART VII: ESTIMATE OF TIME

34. The Amicus estimates that 30 minutes will be required for presentation of oral submissions.

Dated: 20 February 2019

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[32] *Blackwood Foodland Pty Ltd v Milne* [1971] SASR 403 at 411; *Malouf v Malouf* [2006] NSWCA 83 at [175]
[33] S14
[34] The only time a party who is neither Appellant nor Respondent may apply (subject to the general exclusions in s14) for a costs certificate is in the event a new trial is ordered (and even then, the relevant costs are to be the costs of the new trial) pursuant to s8